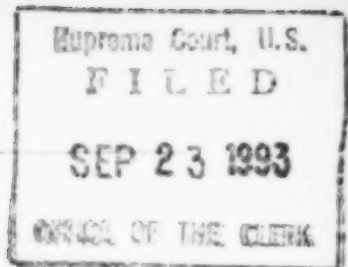


No. 93-141



**In the  
Supreme Court of the United States**

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OCTOBER TERM, 1993

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WEST LYNN CREAMERY, INC. AND  
LECOMTE'S DAIRY, INC.,  
*Petitioners,*

v.

JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS  
DEPARTMENT OF FOOD AND AGRICULTURE,  
*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
MASSACHUSETTS SUPREME JUDICIAL COURT

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**PETITIONERS' REPLY BRIEF**

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**PETITIONERS' REPLY BRIEF**

**INTRODUCTION**

The Petitioners West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's")<sup>1</sup> submit this brief in reply to the Brief in Opposition to Petition for Certiorari

<sup>1</sup> Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

submitted by the Respondent, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner"). First, *Milk Board v. Eisenberg Co.*, 306 U.S. 346 (1939), relied upon by the Commissioner, is inapposite: *Eisenberg* involved a minimum price that was established for in-state milk; this case involves an order that impacts out-of-state milk. Second, the Commissioner could have protected Massachusetts farmers with a less restrictive burden on interstate commerce within the meaning of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Finally, a very recent First Circuit decision misconstrues the Pricing Order and contradicts the Massachusetts Supreme Judicial Court's opinion in this case.

## ARGUMENT

### I. THE COMMISSIONER'S RELIANCE ON *Eisenberg* IN SUPPORT OF THE CONSTITUTIONALITY OF THE PRICING ORDER IS INAPPOSITE.

Relying on *Milk Board v. Eisenberg Co.*, the Commissioner asserts that the Pricing Order is constitutional because it "does not 'attempt to regulate the price to be paid for milk in a sister state. . . .'" (Respondent's Brief in Opposition at pp.18-20 citing *Eisenberg*, 306 U.S. at 353). The statute in *Eisenberg*, however, is wholly different from the Pricing Order. In *Eisenberg*, Pennsylvania set a minimum price that dealers had to pay for milk produced in Pennsylvania. A local dealer argued that the statute burdened interstate commerce because the dealer intended to ship his milk out-of-state after purchasing it in Pennsylvania. The Supreme Court upheld the statute, despite this argument of an indirect effect on interstate commerce. *Id.* at 353.<sup>2</sup>

<sup>2</sup>The Court concluded that the Pennsylvania statute had only an incidental effect on interstate commerce. This conclusion was based in part on the fact that "only a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.*

The Commissioner's reliance on *Eisenberg* is inapposite.<sup>3</sup> The issue in the case before this Court does not involve the Commissioner's authority to fix a minimum price for Massachusetts produced milk. The Pricing Order here effectively sets a minimum price for *all* milk, by requiring dealers to make compensatory payments into the Fund based on the amount of milk sold in Massachusetts, regardless of where the milk was originally purchased (App. A41-A50).<sup>4</sup> Because these compensatory payments equalize the price of in-state and out-of-state milk, the effect is to establish a minimum price for out-of-state milk. Thus, the Pricing Order, like the statute in *Baldwin*, regulates the price paid for milk produced in other states. Moreover, the Pricing Order burdens interstate commerce even more substantially than the statute in *Baldwin* because in *Baldwin*, but not in this case, the out-of-state farmers received the differential between the market price and the New York minimum price. On the other hand, the statute in *Eisenberg* operated only intra-state and the dealer in *Eisenberg*, unlike the dealer in Massachusetts, could purchase its milk at lower prices from other states. Purchases of milk from out-of-state, of course, would cause economic harm to the local farmers involved in the *Eisenberg* case. The Commerce Clause, however, permits states to burden local industry, explaining the result in *Eisenberg*, but does not permit the states to burden industry in other states, explaining the result in *Baldwin*.

<sup>3</sup>The Commissioner's reliance on *Baxley v. Alabama Dairy Commission*, 360 F.Supp. 1159 (Md. Ala. 1973) is also inapplicable (Respondent's Brief in Opposition at p.23). The holding in that case, like *Eisenberg*, is that a state may set minimum prices for in-state milk. *Id.* at 1165. Because the Pricing Order does more than set a minimum price for Massachusetts milk, the holding in *Baxley* is not relevant.

<sup>4</sup>"App." refers to the material printed in the Appendices to the Petitioners' Petition for Writ of Certiorari.

## II. THE INTERESTS SOUGHT BY THE PRICING ORDER COULD BE PROMOTED WITH A LESSER IMPACT ON INTERSTATE COMMERCE.

The Commissioner argues that the interests promoted by the Pricing Order could not be achieved with a lesser impact on interstate commerce, and therefore, the Massachusetts Supreme Judicial Court correctly applied the *Pike* balancing approach in holding the Pricing Order constitutional (Respondent's Brief in Opposition at pp.27-29 citing *Pike v. Bruce Church, Inc.*, 397 U.S. at 137). The Commissioner argues that the "prevention of the collapse of a state industry could not be achieved by any way other than providing monies, directly or indirectly" to in-state farmers (Respondent's Brief in Opposition at pp.28-29). The Pricing Order, however, does more than simply provide a subsidy to Massachusetts farmers. The monies distributed to the Massachusetts farmers *are derived directly from the sale of out-of-state milk*. Since the majority of milk sold in Massachusetts is purchased out-of-state, the assessment on out-of-state milk is being used to subsidize local dairy farmers. Contrary to the Commissioner's assertions, alternative methods of relief — subsidies from the Massachusetts General Fund or tax relief in the form of reduced property or income tax payments — would be less burdensome on interstate commerce than the Pricing Order. First of all, these alternative methods of relief would not directly burden interstate transactions. Second, the Massachusetts Court did not explore the effect of these less restrictive alternatives as required by *Pike*. For these reasons, the Massachusetts court committed error when it concluded that the Pricing Order satisfied the requirements of *Pike*.

## III. THE FIRST CIRCUIT COURT OF APPEALS DECISION INTERPRETING THE PRICING ORDER IS ERRONEOUS BECAUSE THAT COURT MISUNDERSTOOD THE MANNER IN WHICH THE PRICING ORDER OPERATES.

In his Opposition, the Commissioner understandably mentions a recent First Circuit Court of Appeals decision which dismissed the plaintiffs' complaint on the grounds that out-of-state farmers did not sufficiently allege standing to challenge the Pricing Order (Respondent's Brief in Opposition at p.20 citing *Kenneth Adams, et al. v. Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture*, No. 93-1068, slip op. 1993 U.S. App. LEXIS 20569 (1st Cir. August 13, 1993)).

*Adams* involved the same Pricing Order that is at issue in this case. There, the plaintiff out-of-state farmers argued that they were competitively harmed by the Pricing Order because it removed an economic incentive to purchase out-of-state milk — an incentive that would otherwise exist but for the structure of the Pricing Order. The First Circuit concluded that it could reject these specific allegations of injury-in-fact because the Pricing Order "virtually ensures dealers an incentive to purchase out-of-state milk." *Id.* at 12. Therefore, according to the court, the Pricing Order, a regulation designed by the Commissioner to protect Massachusetts farmers, actually helps out-of-state farmers and hurts Massachusetts farmers. *Id.* The court's conclusion was based on a complete misunderstanding of the manner in which the Pricing Order operates. The plaintiff out-of-state farmers have, therefore, petitioned that court for a rehearing and the petition is pending as of this date.

The First Circuit's startling conclusion is contrary to the opinion of the Massachusetts Supreme Judicial Court sought to be reviewed in this Petition. The Massachusetts court noted that the Pricing Order was designed to "boost the amount of money local dairy farmers — the producers — receive for milk

... " *West Lynn Creamery, Inc., et al. v. Commissioner of Department of Food and Agriculture*, 415 Mass. 8, 11 (1993) (App. A4). The Massachusetts court specifically recognized that the Pricing Order has an "adverse impact on interstate commerce." *Id.* at 17 (App. A11). In fact, the Massachusetts court held that the "Pricing Order does burden interstate commerce," but that this burden was only "incidental." *Id.* (App. A13).

The two decisions are at odds because the First Circuit based its decision on an erroneous interpretation of the manner in which the Pricing Order operates. The Court mistakenly believed that payments are made to Massachusetts farmers under the Pricing Order in proportion to their *sales* to Class I milk dealers. *Adams*, No. 93-1068, slip op. 1993 U.S. App. Lexis 20569, at 3.<sup>5</sup> In fact, the Pricing Order *by its express terms* provides that payments are to be made from the Fund to the Massachusetts producers based on "their proportion of milk *produced* in Massachusetts" (App. A45) (emphasis added).

Relying on the erroneous conclusion that producers receive monies from the Fund based on their *sales* to Class I milk dealers, rather than their *production* of milk, the Court believed that the dealers could control how much money the farmers received from the Fund by buying less milk from Massachusetts farmers. *Adams*, No. 93-1068, slip op. 1993 U.S. App. Lexis 20569, at 12. The Court also believed that since monies are distributed to farmers based on the amount of milk they sold to dealers, the dealers could decrease the amount of money distributed to farmers by buying less milk from Massachusetts farmers. *Id.* Therefore, the court concluded that there is "an inadvertent (but certainly significant) incentive under the pricing order for Massachusetts dealers to purchase as much milk as possible from out-of-state producers." *Id.*

In its decision, the Massachusetts court correctly noted that the "Commissioner distributes the fund to producers in proportion to the milk *produced* in Massachusetts" and not in proportion to milk sold by producers to Class I milk dealers. *West Lynn Creamery*, 415 Mass. at 12 (App. A5) (emphasis added).

This is simply not how the Pricing Order operates. Under the Pricing Order, assessment payments are collected from the dealers based on the amount of Class I milk they sell in Massachusetts each month<sup>6</sup> (App. A44-A45). If, for example, a dealer were to purchase 10,000 cwt of milk from in-state farmers and were to sell it all as Class I milk in Massachusetts (assuming a blend price of \$12.00/cwt), the dealer's assessment payment would be \$10,000.00.<sup>7</sup> If, on the other hand, the dealer purchased all of his milk from out-of-state farmers, the dealer's payment would be exactly the same because the assessment is based on the amount of Class I milk a dealer sells in Massachusetts, not the amount of milk purchased from Massachusetts farmers (App. A44-A45).

After monies are deposited into the Fund, Massachusetts farmers receive payments based upon their proportion of milk produced in Massachusetts (App. A45-A47). Thus, if Farmer A produced 10,000 cwt of milk and the total amount produced by Massachusetts farmers was 100,000 cwt of the milk, Farmer A would have produced 10% of milk produced in Massachusetts. He would therefore be entitled to 10% of the total amount in the Fund. Assuming that there is \$1,000,000.00 in the Fund, Farmer A would receive \$100,000.00.<sup>8</sup>

Distributions to the farmers from the Fund have nothing to do with how much milk the farmer actually *sells* to milk dealers for Class I use (App. A45-A47). Regardless of where and for what purpose the Massachusetts farmer sells his milk, he still

<sup>5</sup> The Pricing Order assessment is equal to one-third the difference between the federal blend price and \$15.00/cwt (App. A45).

Assuming a blend price of \$12.00, the assessment would be calculated as follows:  $\frac{1}{3} (\$15.00 - \$12.00) = \$1.00 \times 10,000.00 \text{ cwt (the amount of Class I milk the dealers sold in Massachusetts)} = \$10,000.00$ .

<sup>8</sup> There is a cap on the amount of money a farmer can receive from the Fund: \$15.00 minus the blend price multiplied by the "amount, in pounds, produced by the producer" (App. A46). This cap appears to be designed to ensure that the Massachusetts farmers do not receive more than \$15.00/cwt for the milk that they produce.

receives money based on the amount of Class I milk sold by the dealers in Massachusetts (App. A44-A47). Thus, if Farmer A were to sell all of his milk to a powdered milk facility in New Hampshire for Class III use, instead of to a Class I milk dealer, Farmer A would still receive \$100,000.00 from the Fund. *The formula is based on milk production, rather than Class I milk sales.* Since the dealers cannot control the amount of money distributed to the Massachusetts farmers by purchasing more milk from out-of-state farmers, there is no "inadvertent incentive" created by the Pricing Order to purchase out-of-state milk. The First Circuit's conclusions to the contrary are simply wrong. The Pricing Order in fact harms out-of-state farmers by removing the dealers' incentive to purchase what would otherwise be lower priced out-of-state milk. Therefore, the First Circuit's decision which impliedly states that the Pricing Order does not burden interstate commerce is wrong, and no such inference should be drawn from that decision.

### CONCLUSION

Wherefore, the Petitioners West Lynn Creamery, Inc. and LeComte's Dairy, Inc. respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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